No. 83-1139

IN THE

Supreme Court of the United States

October Term, 1983

TILLIE MOORE,

Petitioner

vs.

BUFFALO BOARD OF EDUCATION,

Respondent

On Appeal From the United States District Court for the Western District of New York

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Issue

Should this Court grant the Petition for a Writ of Certiorari, in order to consider whether the Fifth Amendment guarantees of procedural or substantive due process require that under Rule 60(b)(6) of the Federal Rules of Civil Procedure a District Court judge must consider claims of ineffective counsel as a ground for relief from a judgment.

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Summary of Argument

1. The questions presented lack the requisite public importance requiring immediately the grant of certiorari by this Court. (2) Federal District Courts and Circuit Courts of Appeal routinely consider, on motions for relief under Rule 60(b)(6) of the "Federal Rules of Civil Procedure", the consequences of inadequate counsel in the courts below the appellate level.

ARGUMENT

POINT ONE

The considerations governing review on certiorari to a Federal Court of Appeals before judgment state that the writ should be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate resolution in this Court. U.S. Sup.Ct. Rule 18, 28 U.S.C.

Petitioner seeks to invoke the jurisdiction of this Court to review a District Court's judgment denying relief from the initial trial judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure. Such judgment is appealable to the Court of Appeals under Rule 4(a) of the "Federal Rules of Appellate Procedure." *Browder v. Director of Corrections*, 434 US 257, 98 S.Ct. 556, 54 L. ed 2d 521, reh. denied 434 US 1089, 98 S.Ct. 1286, 55 L. ed 2d 795 (1978).

Petitioner has, simultaneously with filing the petition for certiorari with this Court, petitioned the Court of Appeals for the Second Circuit, by attorney, for a rehearing of the initial determination and for certifica-

tion of the same questions herein presented to this Court.

It is submitted that the instant case does not raise questions of sufficient public importance as distinguished from the interest of the plaintiff, nor does it present a case where there is a "real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Rice v. Sioux City Cemetery,* 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.ed 897 (1954), citing, *Layne and Bowler Corp. v. Western Well Works Inc.,* 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.ed. 712 (1923). The petition is devoid of facts demonstrating such public importance and presents two questions that, in themselves and abstractly, may present an issue of substance. However, as this Court noted in *Rice,* supra, reasons justifying a grant of certiorari go "beyond the academic or the episodic". At p. 74.

Furthermore, this Court has previously considered the disadvantages of a grant certiorari before judgment of a Court of Appeals. In *Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 937, 72 S.Ct. 755, 96 L.ed. 1344, (1952), Justice Frankfurter, in his dissent, noted that the "need for soundness in the result outweighs the need for speed in reaching it". At p. 938. In *Aaron v. Cooper,* 357 U.S. 566, 78 S.Ct. 1189, 2d L.ed. 2d 1544, (1958), the Court agreed with Justice Frankfurter's statement in Youngstown, and noted that absent sufficient public importance, time elements cannot justify a grant of certiorari prior to Court of Appeals judgment. At. p. 567.

POINT TWO

The questions presented in the instant case have been answered by this Court and federal courts generally for many years, especially since the decision in *Klapprott v. United States*, 335 U.S. 601, 69 S.Ct. 384, 93 L.ed. 266, modified 336 U.S. 942 69 S.Ct. 877, 93 L.ed. 1099 (1948). In that case it was held that Rule 60(b)(6) of the Federal Rules of Civil Procedure was "broad enough" to set aside a default judgment and grant a fair hearing. In a subsequent case, it was held that relief may be accorded under Rule 60(b)(6) only in an "extraordinary situation". *Ackermann v. United States*, 340 U.S. 193, 71 S.Ct. 209 95 L.ed. 207, (1950). Again, in *Link v. Wabash R.R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.ed. 2d 734, rehearing denied 371 U.S. 873, 83 S.Ct. 115, 9 L.ed. 2d 112 (1962), this Court stated that Rule 60(b) provides a corrective remedy for reopening of cases where alleged failures of plaintiff's attorney to act caused detriment to the plaintiff's right to a fair hearing. At p. 632.

The Circuit Courts of Appeal, in reviewing District Court decisions, uniformly and routinely hold that where a plaintiff in a civil case is prevented from presenting the merits of his case, relief from an adverse judgment is appropriate under Rule 60(b).

More specifically, Rule 60(b)(6) has been held to be available to grant relief to a petitioner who claims that ineffectiveness, negligence or misrepresentation of counsel deprived him of his right to present the full merits of his case. The following cases are cited as examples of the foregoing in civil cases and demonstrate that no conflict over the issue or standards to be applied exists: *U.S. v. Ciriani*, 535 F.2d 736 (2d Cir.,

1976); *Wilson v. Fenton*, 684 F.2d 249 (3d Cir., 1982); *Boughner v. Secretary of H.E.W.*, 572 F.2d 976 (3d Cir., 1978); *Hensley v. Chesapeake and Ohio R.R. Co.*, 651 F.2d 226 (4th Cir., 1981); *U.S. v. Flores*, 507 F.2d 59 (5th Cir., 1975); *Ervin v. Wilkinson*, 701 F.2d 59 (7th Cir., 1983); *Inryco v. Metropolitan Engineering Co., Inc.*, 708 F.2d 1225 (7th Cir., 1983); *Horace v. St. Louis Southwestern R.R. Co.*, 489 F.2d 632 (8th Cir., 1974); *McKinney v. Boyle*, 404 F.2d 632, cert. denied 394 U.S. 992, 89 S.Ct. 1481, 22 L.ed. 2d 767, reh. denied 395 U.S. 941, 89 S.Ct. 2003, 23 L.ed. 2d 459 (1969); *L.P. Steuart v. Matthews*, 329 F.2d 234, cert. denied 379 U.S. 824, 85 S.Ct. 50, 13 L.ed. 2d 35 (1964); *Transport Pool Division of Container Leasing, Inc. v. Joe Jones Trucking Co.*, 319 F.Supp. (DC Ga., 1970); *U.S. v. Manos*, 56 FRD 655 (SD Ohio, 1972); *Brooks v. Walker*, 82 F.R.D. 95 (DC Mass., 1979).

The underlying rationale for the exercise of discretion in the above listed cases is that justice demands that the plaintiff in civil cases has a right to procedural and substantive due process in the form of a fair hearing, including full presentation on the merits.

The District Court had jurisdiction to hear and decide petitioner's Rule 60(b)(6) motion, and did so. Petitioner had the opportunity to make a showing that ineffective counsel prejudiced her rights at trial. She points to no facts, nor does she claim abuse of discretion in the District Judge's denial of her motion.

CONCLUSION

It is respectfully submitted that petitioner has failed to sustain its burden under Rule 18 of establishing that this case involves issues of imperative public importance requiring immediate settlement in this Court, therefore, the writ should not be granted. Moreoever, there is ample case law demonstrating that District Courts and Circuit Courts of Appeal routinely hear and uniformly hold that, where circumstances warrant, relief from a judgment under Rule 60(b)(6) is available to a plaintiff in a civil case who alleges and demonstrates, denial of the right to a fair hearing due to ineffective counsel.

The petition should be denied.

Respectfully submitted,

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